IN THE

Supreme Court of the United States

OCTOBER TERM, 1970

No. 281

JAMES E. SWANN, ET AL., *Petitioners*

v.

CHARLOTTE-MECKLENBURG BOARD OF EDUCATION, ET AL., *Respondents*

On Writ of Certiorari to the United States Court of Appeals for the Fourth Circuit

No. 436

BIRDIE MAE DAVIS, ET AL., *Petitioners*

v.

BOARD OF SCHOOL COMMISSIONERS OF MOBILE COUNTY, ET AL., *Respondents*

On Petition for Writ of Certiorari to the United States Court of Appeals for the Fifth Circuit

MOTION FOR LEAVE TO FILE BRIEF AMICI CURIAE, OUT OF TIME

and

BRIEF AMICI CURIAE

For the United Negro College Fund, Inc.; the National Urban Coalition; the League of Women Voters of the United States; the League of Women Voters of the State of North Carolina; the League of Women Voters of Charlotte-Mecklenburg, North Carolina; the Mississippi Educational Resources Center; the Center for Law and Education, Harvard University; and the Washington Research Project of the Southern Center for Studies in Public Policy.

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MOTION FOR LEAVE TO FILE BRIEF AMICI CURIAE, OUT OF TIME

The following organizations—the United Negro College Fund, Inc.; the National Urban Coalition; the League of Women Voters of the United States; the League of Women Voters of the State of North Carolina; the League of Women Voters of Charlotte-Mecklenburg, North Carolina; the Mississippi Educational Recources Center; the Center

for Law and Education, Harvard University; and the Washington Research Project of the Southern Center for Studies in Public Policy—hereby move pursuant to Rule 42(3) of the Rules of this Court, for leave to file the attached brief amici curiae in the above-entitled cases.[1] Petitioners in both cases, the United States as a party to No. 436, and the Charlotte-Mecklenburg Board of Education as a respondent in No. 281, have consented to the filing.[2] The other respondents have not yet replied to our request for consent to file.

Under the briefing schedule established by this Court briefs amici curiae supporting the position of petitioners were due by September 16, 1970. Rule 42(2), Rules of Supreme Court. Movant organizations respectfully request that leave be granted to file the attached brief out of time. As set out below, movant organizations represent a broad and diverse spectrum of citizens, united by a common concern for quality integrated education. They desire to present to the Court a unified treatment of these two critical cases. The accelerated briefing schedule established by this Court, under which amici briefs supporting petitioners were due seventeen days after the Court's order, made it impossible for counsel to consult with all of them and agree on a common treatment of both cases, and to prepare a brief giving full and comparative attention to the *Mobile* as well as the *Charlotte* case, by September 16.

The United Negro College Fund, Inc., is an organization consisting of 36 member colleges, all but one of them in the South, which was established in 1943 to raise funds and provide other assistance to member colleges. The Fund and its members have an important and direct interest in assuring that elementary and secondary school students

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[1] Movant organizations earlier filed a brief amici curiae urging the grant of certiorari in No. 281, by leave of this Court granted pursuant to motion.

[2] The written consent of these parties has been filed with the Clerk.

are well prepared for college and thus have a continuing concern about the persistence of segregated public schools.

The National Urban Coalition is an organization whose purpose is to improve opportunities and conditions of life for citizens living in urban areas of the nation. Founded in 1967, it has 47 affiliated local coalitions and representation from corporations, unions, religious, and civil rights organizations. The improvement of educational opportunity is among its prime purposes and to that end it has sponsored educational research and participated as amicus curiae in a case involving the equal distribution of educational resources.

The League of Women Voters of the United States, the League of Women Voters of North Carolina, and the League of Women Voters of Charlotte-Mecklenburg, North Carolina, are three organizations with common aims and principles but with independent decision-making powers. Founded in 1920, the national League now has 156,000 members in all 50 states, the District of Columbia, Puerto Rico, and the Virgin Islands. As part of its overall program of encouraging informed and active participation of citizens in government, the national League has placed major emphasis upon the quality of public education and in 1970 reaffirmed its pledge to support efforts to end racial discrimination in education. The North Carolina and Charlotte-Mecklenburg Leagues have conducted studies of the quality of educational opportunity in their respective areas. Like the national League, they are committed to work for equality of opportunity in education.

The Mississippi Educational Resources Center is a private organization established in 1969 to represent professional, parent, and community groups throughout the State of Mississippi. Its membership is predominantly black. Its purpose is to assist communities and school districts in overcoming problems incident to the school desegregation process and to assure that desegregation takes place and in an orderly and positive manner.

The Center for Law and Education, Harvard University, is an educational institution established in 1969 by Harvard University and the United States Office of Economic Opportunity to "promote reform in American education by working in the area of social policy and law." To carry out its aims, the Center has sponsored and conducted research on various aspects of the educational process. It has also served as amicus curiae in several cases involving issues within the area of its expertise.

The Washington Research Project, established in 1968, is a research organization located in Washington, D. C., and affiliated with the Southern Center for Studies in Public Policy of Clark College in Atlanta, Georgia. The principal aim of the project is to assist in the establishment of equality of opportunity for all citizens through negotiation and monitoring of administrative agency programs and litigation. It is deeply concerned with educational issues, particularly with alleviating the continuing effects of racial discrimination in public schools. It has conducted a study of the impact of Federal aid to education programs on minority children and maintains a continuing effort to monitor such programs to ensure that they are conducted without discrimination.

Each of the movant organizations consists of black and white citizens. While their activities vary, all are bound together by a common commitment to strengthen public education in this country and to work for an end to racial segregation in the schools. All of the movant organizations, moreover, share a common commitment to the maintenance of the rule of law in this nation. They believe that the rule of law is threatened by continuing violations of the rights of Negro school children declared by this Court in 1954.

Movant organizations seek leave to enter these cases for the purpose of supporting fully the position of the petitioners. Movants believe, however, that—by virtue of

their breadth, their special interest in education and the scope of their activities in conducting and sponsoring research on issues of education and civil rights—they are well equipped to inform the Court with respect to the impact that the decisions of the courts below may have upon the process of school desegregation throughout the nation. Further, movants believe that a unified and comparative treatment of these two cases might helpfully supplement the separate treatment provided in the briefs for the petitioners.

Accordingly, movant organizations respectfully request that the Court grant leave to file the attached brief amici curiae.

Respectfully submitted,

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BRIEF AMICI CURIAE

For the United Negro College Fund, Inc.; the National Urban Coalition; the League of Women Voters of the United States; the League of Women Voters of the State of North Carolina; the League of Women Voters of Charlotte-Mecklenburg, North Carolina; the Mississippi Educational Resources Center; the Center for Law and Education, Harvard University; and the Washington Research Project of the Southern Center for Studies in Public Policy.

INTEREST OF AMICI

Amici, as is more fully set forth in the Motion for Leave to File a Brief Amici Curiae, are all organizations with a deep interest in maintaining and improv-

ing the quality of education available to children of all races. As a part of this interest, they have all committed themselves to work for the elimination of racial segregation and other forms of discrimination in education.

Several amici have conducted or sponsored research on problems of establishing equal educational opportunity. Others have supported and appeared in litigation involving the public schools and discrimination. Still others have undertaken to work for the full and fair enforcement of civil rights laws by Executive departments and agencies of the Federal Government.

All have a commitment to the maintenance of the rule of law and a deep concern about the continuing denial of constitutional rights of black school children.

STATEMENT

A. No. 281, Swann v. Charlotte-Mecklenburg Board of Education

During the 1968-69 school year, the Charlotte-Mecklenburg school system served more than 84,000 pupils in 107 schools (293a-294a).[1] Approximately 71 per cent of the pupils were white and 29 per cent were black. During that year, nearly 17,000 of the more than 24,000 black pupils in the district attended predominantly black schools, under a geographic zoning plan allowing for free transfer (459a).

To remedy this situation, which all parties now agree fell short of achieving a unitary school system, the district court held numerous hearings and received voluminous evidence. As a result of this extensive liti-

[1] Record references in this form are to the printed Appendix filed in No. 281.

gation, the details of which are set out in the Brief for Petitioners in No. 281, the district court was presented in February of 1970 with two alternative pupil assignment plans.

The school board proposed a plan which was based exclusively upon the technique of "neighborhood" or contiguous attendance zoning (727a-728a). The board plan substantially integrated all the high schools, producing a white majority of at least 64 per cent in each school (829a). The plan desegregated most of the junior high schools, but left one of them 90 per cent black and several virtually all white (830a). With respect to the elementary schools, the board plan left more than half the black elementary school pupils in nine schools which were between 83 per cent and 100 per cent black and about half the white elementary pupils in schools 86 per cent to 100 per cent white (832a-834a).

An educational expert appointed by the court, Dr. John Finger, presented an alternative plan which desegregated every school in the Charlotte-Mecklenburg system. With one minor modification, not now in issue, his plan adopted the board's proposed zoning of high school attendance areas. With respect to the junior high schools and the elementary schools, the plan started with the contiguous attendance zones proposed by the board, but where those zones left schools racially identifiable by the makeup of their student bodies, it paired all-black or predominantly black schools with non-contiguous all-white or predominantly white schools so that all the students in the zones feeding both schools would attend the formerly white school for grades 1-4 and the formerly black school for grades 5-6 (1209a-1214a).

Before February 1970, the Charlotte-Mecklenburg school system had provided substantial bus service to its pupils. During the 1969-70 school year, the board operated 280 school buses transporting nearly 25,000 of its 84,000 students (619a), at a cost of about $475,000, or about $20 per child (1259a). The plan devised by the court-appointed expert required the additional transportation of 13,300 pupils—1,500 high school, 2,500 junior high school, and 9,300 elementary school. The additional operating cost of transporting these pupils was to be about $266,000 (1269a). It was originally thought that the new busing requirements would entail a capital outlay of about $745,000, but it now appears from the hearing held after this Court granted certiorari that the outlay will be much lower because of surplus buses the school board has on hand (Br. A18-A23).[2] The school budget for the Charlotte-Mecklenburg system for 1970-71 is about $66 million (Br. A21).

Under the court expert's plan, approximately 47 per cent of the pupils in the Charlotte-Mecklenburg system would be bused to school. In North Carolina as a whole, about 55 per cent of all pupils ride buses to school (1289a). The average one-way bus trip for pupils newly bused under the plan would be about 7 miles, taking about 35 minutes (1215a). In North Carolina as a whole, the average one-way bus trip is about 12 miles (1199a), and in Charlotte-Mecklenburg the average trip during the 1969-70 school year was about 15 miles, taking about an hour and a quarter (1204a).

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[2] Record references in this form are to the Appendix to the Brief for Petitioners in No. 281, wherein the district court proceedings following this Court's grant of certiorari are set out.

The district court ruled that the school board's plan fell short of constitutional requirements, while the plan proposed by the court-appointed expert did achieve a unitary system and was feasible; accordingly, he ordered the expert's plan into effect (819a). On appeal, the court of appeals agreed that the school board's plan failed to achieve a sufficient degree of pupil integration to qualify as a unitary plan, and accepted the district court assignment plans for junior and senior high schools, plans which involved some noncontiguous zoning and additional busing. However the court held that the assignment plan for elementary schools required an excessive amount of additional transportation, and set aside that part of the order. The court adopted what it called "the test of reasonableness"; it held "first, that not every school in a unitary system need be integrated; second, nevertheless, school boards must use all reasonable means to integrate the schools in their jurisdiction. . . ." (1267a). Judges Sobeloff and Winter, dissenting, would have affirmed the district court order in its entirety (1279a; 1295a); Judge Bryan, concurring specially, indicated his belief that the plan proposed by the school board met constitutional standards (1295a).

On remand, after this Court granted certiorari, the district court reaffirmed its original order. The school board failed to come forward with a new plan, and the district court found that no educationally sound plan falling short of the degree of desegregation achieved in its original order had been proposed (Br. A2, A27).

B. No. 436, Davis v. Board of School Commissioners of Mobile County[8]

The Mobile County school system served about 73,500 pupils during 1969-70 in 91 schools; about 58 per cent of the pupils were white and 42 per cent black. As in Charlotte, an extended course of litigation, summarized in the Brief for Petitioners in No. 436, led to a situation in January of 1970 in which the district court was required to select from alternative plans the one which would best comport with constitutional requirements.

The school board proposed a plan under which nearly 19,000 black children, about 60 per cent of the black students in the system, would be assigned to 21 all-black or virtually all-black schools. Educational experts from the Department of Health, Education and Welfare proposed two plans. The first was based entirely upon the technique of contiguous zoning, and required no additional transportation of students, but left nine all-black schools serving nearly 8,000 pupils. The second HEW plan used the additional technique of satellite or noncontiguous zoning, and paired the remaining all-black schools with predominantly white schools in the same way as did the plan ordered by the district court in Charlotte. It left no schools all-black.

Like the Charlotte-Mecklenburg system, the Mobile County system has in the past provided substantial bus service for its pupils. During the 1967-68 school year, 207 buses transported 22,094 pupils daily. Busing was not confined to the rural areas of the county; during the 1966-67 school year, 7,116 pupils were bused within metropolitan Mobile. Nor was busing confined to trans-

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[8] Because the printed Appendix in No. 436 was not available when this brief was prepared, our statement of the case necessarily lacks record references.

porting pupils to the nearest school; during the 1966-67 school year, 2,350 pupils were bused because of non-contiguous zone assignments. Much of the busing was provided in order to maintain segregation.

Because the district court did not hold evidentiary hearings on the proposed plan, the record in this case does not reflect the extent or cost of the additional transportation which would be required to implement the HEW alternative plan which eliminated the all-black schools in the Mobile system.

In the January 1970 district court proceedings, the petitioners urged the court to adopt the HEW plan which would eliminate the all-black schools; the United States, which is a party to the case, urged the adoption of the other HEW plan, which proposed no additional transportation but left several all-black schools; and the school board urged adoption of its own plan. The district court ordered the school board plan into effect. On appeal, the three parties maintained their respective positions. The court of appeals held that the school board plan did not provide a unitary system, but at the same time it rejected petitioner's HEW plan which would have eliminated the all-black schools. It accepted a modification of the HEW contiguous zoning proposal, which, after further modification, left six all-black elementary schools serving about 5,300 children—about 17 per cent of the black pupils in the whole Mobile County system, and about 50 per cent of the black elementary school pupils in metropolitan Mobile. There have been further subsequent minor modifications of the plan, but the record does not make clear how these modifications have affected the racial makeup of the schools.

The court of appeals proceeded under a legal stand
ard which it stated as follows:

> "We have examined each of the plans presente
> to the district court in an effort to determine whic
> would go further toward eliminating all Negro o
> virtually all Negro student body schools while a
> the same time maintaining the neighborhoo
> school concept of the school system."

C. A Comparison of the Two Cases

Both the Mobile and the Charlotte school systems op
erated full dual school systems based on race well int
the 1960's. In both, little pupil desegregation ha
been achieved by the end of the 1968-69 school yea
Both are large systems, serving a majority of urba
and a minority of rural school children. Both systen
have in the past transported substantial numbers o
children to school by bus and in both busing has bee
used to perpetuate the system of segregation.

In both systems, substantial residential segregatio
makes it impossible fully to desegregate each elemen
tary school if assignment is based solely on "neighbo
hood" or contiguous attendance zones. In both case
plans have been proposed which would use only co
tiguous zones, and in both cases these plans would leav
approximately half of the black elementary school chi
dren in all-black or virtually all-black schools. In bot
cases, alternative plans have been proposed whic
would desegregate every school's student body by pai
ing schools in black areas with schools in noncontiguou
white areas; in both of the cases, these plans would r
quire the school system to provide additional tran
portation to get children to school.

In the *Charlotte* case, district court findings sup
ported by substantial evidence indicate that the add

tional transportation required by the complete desegregation plan would cost the school less than one percent of its operating budget. The percentage of children bused under the plan, and the average length of the bus trip, would be well within the statewide average for North Carolina. Similar evidence and findings are not available in the *Mobile* case, in which the district court has not held evidentiary hearings on the proposed plans. However the record in the case indicates that both noncontiguous zoning and busing of students are familiar assignment techniques in the Mobile school system.

In both cases, the respective courts of appeals have rejected the proposed plan which would completely desegregate the school system. The rationales for the rejection differ somewhat: in the *Mobile* case the Fifth Circuit has refused to go beyond "neighborhood" or contiguous zoning to achieve desegregation; while in the *Charlotte* case, the Fourth Circuit has approved some noncontiguous zoning with accompanying additional transportation, but has disapproved more extensive use of the same technique as "unreasonable."

SUMMARY OF ARGUMENT

I. In *Brown* v. *Board of Education of Topeka,* 347 U.S. 483 (1954), this Court found that the system of official segregation of the schools, based as it was upon the assumption that black people were morally and intellectually inferior to whites, amounted to a massive government-sponsored racial insult to the black people subjected to it, and hence violated the equal protection clause. In *Green* v. *Board of School Commissioners of New Kent County,* 391 U.S. 430 (1968), the Court declared three basic principles to govern final implemen-

tation of *Brown*: 1) the system of segregation must be dismantled and its effects undone; 2) the goal of this process is the abolition of racially identifiable schools; and 3) officials must take all feasible steps to achieve this goal and bear a heavy burden of justification for any failure to do so.

In the context of the present cases, *Brown* and *Green* mean that in school districts which have officially segregated the races, schools with all-black or very disproportionately black student bodies cannot be tolerated where feasible alternative plans of pupil assignment exist. Such schools are racially identifiable "black schools." To both whites and blacks in the community they represent the perpetuation of the system of official segregation and the official assumption of black inferiority upon which that system rests. They inflict the same psychological harm on black children as was condemned in *Brown*, and they perpetuate tangibly second-rate education for the pupils assigned to them. These schools must be abolished wherever this is possible through known techniques of pupil assignment; no excuse short of complete technical unfeasibility can be allowed.

II. The issue in these cases is not whether as an abstract matter the Constitution commands a particular racial balance in public schools, or even whether the Constitution condemns all-black schools as such. It is rather what remedy is required to undo the particular historical system of school segregation existing in this country, founded as it has been on assumptions of racial inferiority. The instructive analogy is to faculty desegregation, where this Court has approved a requirement of full racial balance, not as a substantive constitutional requirement, but as a remedy to dis-

mantle a well-entrenched system and to undo, as far as possible, the effects of that system.

III. In the two present cases, the courts of appeals have tolerated the perpetuation of black schools on grounds short of the unfeasibility of abolishing them. In Charlotte, the district court ordered a plan of complete desegregation which the record makes clear is technically feasible. In Mobile, the district court's failure to hold hearings has prevented development of a similar record, but a plan of complete desegregation, never found unfeasible by any court, has been submitted by government educational experts.

The excuses put forward to justify continued segregated schools are constitutionally insufficient. The Fifth Circuit's "neighborhood school concept" represents only one among several competing systems of pupil assignment used in this country, one without constitutional status, and one which has not been used in the South generally or in Mobile in particular. The Fourth Circuit's vague "rule of reasonableness" appears to excuse continued segregation where integration would require "too much" incidental transportation with its accompanying cost. Cost as such, particularly the very limited costs of achieving full desegregation in these cases, is not a sufficient excuse for maintaining segregated schools. Busing is a familiar technique of getting children to school, often used for purposes other than desegregation. It, like all other standard educational techniques, must be used where needed to complete the process of disestablishing the dual school system.

ARGUMENT

I. DISESTABLISHMENT OF A DUAL SCHOOL SYSTEM REQUIRES THAT, UNLESS DEMONSTRABLY UNFEASIBLE, PUPILS BE ASSIGNED SO THAT NO SCHOOL HAS A STUDENT BODY WHICH IS ALL-BLACK OR SO DISPROPORTIONATELY BLACK AS TO MAKE THE SCHOOL IDENTIFIABLE AS A "BLACK SCHOOL".

These cases raise the question whether school officials who have been operating separate systems of schools based upon race can be said to have disestablished those systems when they continue to assign pupils so as to maintain schools with all-black or disproportionately black student bodies. We submit that the answer is "No"—at least where there exist feasible alternative methods of assignment which would desegregate those schools.

The issue is not whether as an abstract matter the Constitution requires any particular racial balance in public schools generally, or even whether the Constitution generally forbids all-black or predominantly black schools whatever their historical background. Rather the issue is the narrower one of what remedy is required to eliminate the last vestiges of a particular historical practice, long since judged to be unconstitutional, namely the official and mandatory assignment of black children to separate schools set aside for their race.

The underlying rationale of *Brown* v. *Board of Education of Topeka,* 347 U.S. 483 (1954) (*Brown I*) and the specific principles pronounced in *Green* v. *Board of School Commissioners of New Kent County,* 391 U.S. 430 (1968), require the abolition of schools identifiable as black by the makeup of their student bodies, wherever this can be accomplished by feasible techniques of student assignment. The grounds stated by

the Fourth and Fifth Circuit Courts of Appeals for approving plans which fall short of this requirement in the present cases are insufficient as a matter of established law.

A. The Rationale of Brown I.

In the first *Brown* decision, this Court held that racial segregation of the public schools violated the equal protection rights of black children. In the American historical context, the system of segregation was no less than a massive government-sponsored racial insult to the black people subjected to it, based on assumptions of their intellectual and moral inferiority to white people. The system of segregation, and the official insult it carried with it, was most damaging as applied in the schools, for there it was directed at children of unformed minds and developing personalities, in the public institutions most crucial to their growth. The system was unconstitutional because the history of the Fourteenth Amendment made clear that the framers meant to forbid all official action which injured or degraded black people because they were black.[4]

Thus *Brown I* rested firmly on the finding of the Kansas district court: "Segregation of white and colored children has a detrimental effect upon colored children. The impact is greater when it has the sanction of the law; for the policy of separating the races is usually interpreted as denoting the inferiority of the Negro groups." 347 U.S. at 494. That was sufficient to establish the constitutional violation; official segregation meant official imputation of racial inferiority, and hence official injury to black people because of their race.

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[4] See generally Black, *The Lawfulness of the Desegregation Decisions*, 69 Yale L.J. 421 (1960).

B. The Principles Declared in Green.

In *Brown I* the Court declared the basic principle; in *Brown* v. *Board of Education of Topeka,* 349 U.S. 294 (1955) (*Brown II*), the job of implementing the principle was returned to the district courts. In *Green, supra,* the Court addressed itself in detail to the standards governing that implementation, and laid down three essential guidelines which govern these cases.

First, the Court stated that the constitutional goal was "the abolition of the system of segregation and its effects." 391 U.S. at 440.[5] The Court, in referring to the *system* of segregation and its *effects,* recognized that the dual school system constituted and supported a set of social practices, practices which by their existence and maintenance conveyed and continued the racial insult condemned in *Brown I.* The job of the courts in remedying the wrong of segregation was not merely to undo the formal legal arrangements of the dual system, but also more broadly to dismantle the institutions in which those arrangements found fruition.[6]

Second, the Court specified what a unitary system was: it was one "without a 'white' school and a 'Negro' school, but just schools." 391 U.S. at 442. Here the Court dispelled any notion that a system might somehow be desegregated while its schools retained their former racial identification.

Third, the Court placed upon officials who had operated dual school systems "the affirmative duty to

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[5] The Court in *Green* traced the obligation to abolish and dismantle the entire system of segregation back to *Brown II* and its command, 349 U.S. at 301, "to effectuate a transition to a racially nondiscriminatory school system." 391 U.S. at 435.

[6] See *Green,* 391 U.S. at 437: "*Brown II* was a call for the dismantling of well-entrenched dual systems . . . ."

take *whatever steps might be necessary* to convert to a unitary system in which racial discrimination would be eliminated root and branch." 391 U.S. at 437-438 (emphasis added). When school officials claimed to be operating unitary systems, the district courts were to "weigh that claim in light of the facts at hand and in light of *any alternatives which may be shown as feasible* and more promising in their effectiveness. . . ." 391 U.S. 439 (emphasis added). Thus no excuse would be heard that the means required might be too onerous; the school officials were to take "whatever steps might be necessary," to adopt "any alternatives which may be shown to be feasible." Along with the "affirmative duty" to achieve complete desegregation went *"a heavy burden upon the board* to explain its preference" for anything less than the most effective feasible plan of desegregation. *Ibid.* (emphasis added).

Thus *Green* held : 1) that the system of segregation must be dismantled and its effects undone; 2) that the goal of this process was the abolition of racially identifiable schools; and 3) that boards must take all feasible steps to achieve this goal and bear a heavy burden of justification for any failure to do so.

C. Schools With Black Student Bodies Which Could by Feasible Assignment Techniques Be Desegregated Are Remnants of the System of Discrimination Condemned in Brown I.

Where a school in a dual system is attended exclusively or very largely by black children, and where school officials maintain this attendance pattern in the face of feasible alternatives which would produce an integrated student body, that school is as a practical matter the equivalent to the "colored school" of the pre-*Brown* system of segregation. The very difficulty

of persuading southern school officials, southern judges, and even federal bureaucrats to do the job of integrating these schools is the best evidence for this fact. White school officials and parents feel a peculiar horror at the idea of assigning white children to these schools, as the records in these cases attest.

In Charlotte, when the school board was finally forced to the point of achieving some substantial desegregation in the summer of 1969, it proposed to move substantial numbers of black children to white schools, and to use school buses to get them there (481a-482a). Several black schools were closed, and the children whom they had served were bussed into white neighborhoods. There were no accompanying transfers of white students into the black central city schools (590a). Judge McMillan pointed out that this one-way integration plan was "an affront to the dignity and pride of the black citizens" in his August 15, 1969, order, but felt compelled to accept the plan for the 1969-70 school year by the exigencies of time (586a, 589a-590a).

In Mobile, when educational experts from the Department of Health, Education and Welfare were asked to prepare a plan for desegregation in the summer of 1969, their response also was to close black schools and bus the children who had attended them into white areas of town. But, where closing of a black school could not be justified, the student body of that school was left all-black; no white-to-black transfers were proposed. When the experts were asked about this obvious discrepancy, their response—that "cross-busing" did not have "financial" or "community" support—amounted to a concession that the notion of actually desegregating "black schools" by assigning white stu-

dents to them was too radical to contemplate even in the year 1969. They purported to rely on alleged legal difficulties with ordering busing of students to achieve desegregation, but as the plan they submitted clearly shows their chief concern was with *cross-busing*—the busing of white as well as black children.

In general, school desegregation to date has been a one-way process. Black children have been allowed into the white schools, but there have been few corresponding transfers of white children to black schools. Instead, large numbers of those black schools have been closed or reassigned to subsidiary uses such as vocational or special education classes even where they were newer and better equipped than the white schools which remained open, and even at the cost of running the newly integrated white schools on double shifts. Where black schools could not be closed, they have largely remained all black.[7]

Thus the black schools of today, identified by their all-black or predominantly black student bodies and by their location in black neighborhoods, retain for the white community which seeks so hard to avoid them the stigma originally conferred by the underlying segregationist assumption that they are for inferior chil-

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[7] On one-way integration and black school closings, see Judge McMillan's order in the *Charlotte* case, text, *supra;* see also *Felder* v. *Harnett County Board of Education,* 409 F.2d 1070, 1074 (C.A. 4, 1969); *Haney* v. *County Board of Education of Sevier County,* C.A. 8, No. 19,899, June 29, 1970 (slip opinion at 11-13); *Andrews* v. *City of Monroe,* C.A. 5, No. 29358, April 23, 1970 (slip opinion at 8); *Wright* v. *Board of Public Instruction of Alachua County,* C.A. 5, No. 29999, August 4, 1970 (slip opinion at 5); *Allen* v. *Board of Public Instruction of Broward County,* C.A. 5, No. 30032, August 18, 1970 (slip opinion at 7).

dren.[8] But if they still bear that stigma for the white community, so do they for the black community and for the black children who attend them. This being so, assignment to these schools must have for these black children the same ineradicable effects upon their hearts and minds which this Court condemned as the central vice of state-imposed segregation in *Brown I*.[9]

Black schools are inferior not only because of the racist assumptions upon which they are founded and the consequent psychological harm they do, but also in a more tangible sense. These schools receive less of the resources available for education than do schools attended by the children of the dominant white community, and provide correspondingly inferior facilities and services. For example, the Civil Rights Commission found that, in a sixteen-county area of Alabama,

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[8] One of the findings of the Civil Rights Commission, based upon its analysis of the extensive Coleman data on race and education was that:

> "Predominantly Negro schools generally are regarded by the community as inferior institutions. Negro students in such schools are sensitive to such views and often come to share them. Teachers and administrative staff frequently recognize or share the community's view and communicate it to the students. This stigma affects the achievement and attitudes of Negro students." U.S. Commission on Civil Rights, *Racial Isolation in the Public Schools* 204 (1967).

[9] A district judge with long experience in the struggle to disestablish the official dual school system put the point well:

> "The entire community, white and black, whose own attitude toward Negro schools is what stigmatizes those schools as inferior, must be disabused of any assumption that the schools are still officially segregated, an assumption it might cling to if after supposed 'desegregation' the schools remained segregated in fact." *Hobson* v. *Hansen*, 269 F. Supp. 401, 495 (D.D.C. 1967).

white-attended school buildings and their contents were worth an average of $981 per pupil, compared with an average of $283 per pupil at black-attended schools.[10] Test scores reveal the stark results of this kind of disparity—black twelfth grade pupils in the urban South score 3.5 grade levels behind their white counterparts on standard reading comprehension tests.[11]

It is a fact of political life in the South that the power and influence needed to improve the quality of schools resides in the white community. That community would not long tolerate for its children the kind of education which has typically been supplied to black children in their separate schools. Only when there are no more black schools as such, when the children of the white community attend every school, will every school receive its fair share of available educational resources.

In *Green,* this Court, recognizing both the continuing psychological harm and the continuing inferior education inherent in the black schools surviving from the pre-*Brown* system of segregation, named the racial identifiability of schools as the essential evil to be abolished by the desegregation process. 391 U.S. at 442. When school officials maintain schools with student bodies all-black or black in gross disproportion to the racial makeup of their districts as a whole, even in the face of feasible alternatives, they are maintaining

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[10] Transcript of Hearing held before the U.S. Commission on Civil Rights, Montgomery, Alabama (1968), Exhibit No. 26 at 863.

[11] United States Office of Education, *Equality of Educational Opportunity* (1966), at 274.

racially identifiable black schools.[12] *Green* thus requires these officials to take "whatever steps might be necessary" to abolish their black schools.[13]

In the context of these cases, this means that school officials must adopt any *feasible* plan of pupil assignment which promises to leave no school's student body identifiably black. As Judge Sobeloff has said, "school boards are not obligated to do the impossible. Federal courts do not joust at windmills. Thus it is proper to ask whether a plan is feasible, whether it can be accomplished." (1284a). For example, there are all-black or virtually all-black school districts, which obviously cannot within their own boundaries abolish black schools. Though we would not discount the pos-

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[12] In one of the companion cases to Green, *Monroe* v. *Board of Commissioners of the City of Jackson*, 391 U.S. 450 (1968), the Court held that a geographic zoning plan with a provision for free transfers was proved ineffective, and hence insufficient to meet constitutional requirements, by the survival of a junior high school and three elementary school attended only by black students. This rendered them "Negro" schools within the meaning of *Green*. 391 U.S. at 457.

[13] Of course in *Green* the Court condemned the maintenance of "white" as well as "black" schools. We have focused in these cases on the requirement of eliminating the black schools, because it is through them that the insult of official discrimination condemned in *Brown I* is most concretely imposed upon black people. This is not to slight the importance of the goal of eliminating white schools as well. Where all-white schools are allowed to continue, they provide a safe haven for whites attempting to avoid desegregation, and thus constitute a threat to the stability of a desegregated school system. As Judge McMillan stated in the *Charlotte* case, elimination of all-white schools:

> "would tend to eliminate shopping around for schools; all the schools, in the *New Kent County* language, would be 'just schools'; it would make all schools equally 'desirable' or 'undesirable' depending on the point of view; it would equalize the benefits and burdens of desegregation over the whole county . . . ." (310a-311a).

sibility of restructuring school district lines to achieve some degree of practical desegregation in such cases, it may be that in some instances geographic factors make this a practical impossibility. In these few cases, the law obviously does not require abolition of the black schools.

The limitation of feasibility is meant only to deal with these few isolated situations where existing techniques do not make full desegregation a practical possibility. It is meant to exclude all other excuses for the continued maintenance of black schools in dual systems. These other excuses are often put forward under the rubric that complete desegregation would be "impractical," but they do not mean that it cannot be achieved by known techniques. Rather as in these cases, they mean that it is not a sufficiently important goal to justify the use of techniques already familiar to educators—such as placing children on buses for a half-hour or an hour in order to get them to school. In this sense, the "impracticality" of desegregation means added inconvenience for administrators, or resistance to the reallocation of resources from other programs, or other political opposition to desegregation from the white community.

If excuses of this sort could justify failure to abolish all remnants of the dual system, this Court's command in *Green* that school officials take "whatever steps might be necessary" would be rendered a nullity. Only last Term, this Court made it clear that no such nullifying interpretation was intended; against all objections of cost, inconvenience, impracticality, even "chaos"—objections made not only by school officials but by the national administration—it unanimously ordered that plans promising an end to the dual system be put into effect *now,* in mid-school-year if that was necessary.

Alexander v. *Holmes County Board of Education*, 396 U.S. 19 (1969).[14]

II. ELIMINATION OF "BLACK SCHOOLS," WHERE FEASIBLE, IS REQUIRED AS A REMEDY FOR THE WRONG OF OFFICIAL SEGREGATION WHICH PRODUCED THOSE SCHOOLS.

We have not argued that every school with an all-black or predominantly black student body represents a violation of the equal protection clause. Such an argument could be made; there is substantial evidence that isolation of black children in schools wherever and for whatever reason it occurs, correlates highly with inferior education. United States Commission on Civil Rights, *Racial Isolation in the Public Schools* 202-204 (1967). However, no such substantive constitutional doctrine need be advanced in order to decide these cases according to the rule we have argued for.[15]

We deal, in Charlotte and Mobile, not just with *any* concentrations of black children in separate schools, but with concentrations surviving from a system which segregated these children as part of an official policy based on their assumed inferiority. We ask the Court to declare, not that the Constitution condemns

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[14] Compare *Carter* v. *West Feliciana Parish School Board*, 396 U.S. 290, 296 (1970) (Harlan, J., concurring): "If Department recommendations are already available the school districts are to bear the burden of demonstrating beyond question, after a hearing, the unworkability of the proposals . . . ."

[15] "*De facto*" racial segregation of the schools has been held unconstitutional in several federal cases, among them *Hobson* v. *Hansen*, *supra* Note 9, and *Blocker* v. *Board of Education*, 226 F. Supp. 208 (E.D.N.Y. 1964).

We do not disclaim the arguments put forward in these cases and elsewhere that the Constitution condemns adventitious racial segregation; we merely point out that no such argument need be accepted in order to require the abolition of black schools as part of the process of dismantling official segregation.

black schools as such, but that federal courts of equity in abolishing the discriminatory dual school system must abolish the black schools which continue as a remnant of that system.

Thus it is not necessary in these cases for the Court to confront the question of the legal status of black schools in states which did not maintain formal statutory systems of school segregation. It may be that some school districts which have not maintained full dual systems have nonetheless brought about the existence of black schools through official action. In those cases, both the principle of *Brown I* and the remedial standards of *Green* would logically apply. Cf. *United States* v. *School District 151 of Cook County,* 404 F2d 1125 (C.A.7, 1968) What we stress here is that the abolition of black schools is required as a remedy to undo the effects of past unconstitutional discrimination.

The concept of a *remedial* standard is well illustrated by the way in which this Court and the lower federal courts have handled the dismantling of another aspect of the dual school system, the institution of faculty segregation. In *United States* v. *Montgomery County,* 395 U.S. 225 (1969), this Court granted certiorari to review a district court decree ordering a school board to assign faculty so that the ratio of black to white teachers in each school was substantially equal to the ratio in the system as a whole. In arguing for reinstatement of the district court decree, which had been set aside by the court of appeals, the United States relied on the same notion of a remedial standard, imposed to measure the achievement of a constitutional goal, as we urge here.

The government pointed out that general directions by the courts to "desegregate" or "abolish the dual

system" had not proved effective; more precise instructions were needed to accomplish the constitutional end. "The standard approved . . . by the district court in this case is an appropriate and workable means of measuring faculty desegregation under judicial supervision." Brief for U.S., No. 798 October Term 1968, at 12. Similarly here, the requirement of no all-black student bodies where a workable alternative exists is a relatively precise standard by which to measure the elimination of the racial identifiability of the schools in a dual system, a standard which would be more effective and less productive of delay and confusion than the vague tests now employed by the Fourth and Fifth Circuits.

In the *Montgomery County* case, the government also argued that the numerical ratio required by the district court was "designed as a *remedy for* past racial assignment which, as a result of respondent's deliberate actions, has produced racially identifiable faculties." The government added: "There is no suggestion in the district court's opinion, nor is there intended to be any in our submission here, that proportional allocation of faculty on the basis of race is a constitutional requirement." Brief for United States, No. 798 October Term 1968, at 13. Similarly here, we urge conscious racial assignment of students to eliminate the all-black schools which were produced by and survive from the system of conscious assignment on the basis of race formerly employed by the respondents here; we do not rely on any constitutional prohibition against all-black schools as such.[16]

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[16] Compare *Louisiana* v. *United States*, 380 U.S. 145, 154 (1965):

> "We bear in mind that the court has not only the power but the duty to render a decree which will so far as possible eliminate the discriminatory effects of the past as well as bar like discrimination in the future."

This Court unanimously sustained the government's argument in *Montgomery County*. The aftermath of that decision is instructive. Within months after this Court had approved the proportional racial allocation rule as ordered by the district court, both the Fourth and Fifth Circuit had adopted the same strict rule to govern faculty assignment in *all* desegregating school districts under their jurisdictions. *Nesbit* v. *Statesville City Board of Education,* 418 F.2d 1040 (C.A. 4, 1969); *Singleton* v. *Jackson Municipal Separate School District,* 419 F.2d 1211, (C.A. 5, 1969). The President in his March 24, 1970 statement, giving the Administration's view of existing school law, adopted the same rule for nationwide enforcement by the executive branch.[17] In short, as soon as this Court approved a simple and easily applied rule, even a very strict one, to measure the achievement of a unitary system in the area of faculty desegregation, the courts and the executive branch united to apply it generally. The result has been that the issue of faculty desegregation, once as divisive in the schools and time-consuming in the courts as the issue of student desegregation is today, has virtually disappeared as a source of delay and confusion in the process of converting to unitary school systems throughout the South.

In our view, adoption of the rule we propose here for student desegregation would have much the same result in the area of pupil assignment. Southern school officials would turn from struggling to maintain the greatest degree of pupil segregation which could be wrested from the courts to quick and final abolition of the dual system and then to their basic job of education.

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[17] Statement of the President on School Desegregation, March 24, 1970, at 13.

With the establishment of a relatively simple and easily administrable rule, the protests of unhappy white constituents, now spurred by hopes of success for such slogans as "neighborhood schools" and "no busing" could be turned aside by the unanswerable response that the courts have finally spoken, the law is now clear, the job now finally must be done.

III. THE COURTS OF APPEALS IN THESE TWO CASES IMPERMISSIBLY APPROVED THE CONTINUED EXISTENCE OF BLACK SCHOOLS ON GROUNDS FALLING SHORT OF THE UNFEASIBILITY OF DESEGREGATING THEM.

In each of these cases, a plan, drawn up by educational experts, which would have achieved the desegregation of the student body of each and every school, was submitted to the district court. In each case a plan which fell short of achieving this goal was approved by the court of appeals. In neither case was the plan which would have achieved complete desegregation shown to be unfeasible. Indeed in the *Charlotte* case, the record made in the district court and the court's findings supported by that record incontravertibly establish that the complete desegregation plan was feasible within any definition of that term. In the *Mobile* case, the complete desegregation plan closely resembled the plan accepted by the district court in Charlotte, based as it was upon the same technique of limited noncontiguous pairing of white and black schools. Only the failure of the district court in Mobile to hold a hearing on the proposed plans prevented the development of a record which could have conclusively established the feasibility of this plan. There is nothing in the record, however, to suggest that the plan is less than fully feasible; and in any event, the school board has in no way met its burden of proving it impossible to

implement. Cf. *Carter* v. *West Feliciana Parish School Board, supra,* 396 U.S. at 296 (Harlan, J., concurring).

The courts of appeals did not purport to find either of the complete desegregation plans unfeasible. Rather the courts rejected them on other grounds: the Fifth Circuit in the *Mobile* case because the plan went beyond "neighborhood" zoning, the Fourth Circuit in the *Charlotte* case because the plan required an "unreasonable" amount of busing. Neither of these grounds provides a constitutionally sufficient excuse for maintaining all-black schools as remnants of the system of segregation.

A. The Mobile Case and the "Neighborhood School Concept".

In the *Mobile* case below, this Fifth Circuit panel[18] announced its intention to accept that plan "which would go further toward eliminating all Negro or virtually all Negro student body schools while at the same

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[18] The "neighborhood school" rule followed in this case is by no means a uniform standard for defining achievement of a unitary school system within the Fifth Circuit. In *Adams* v. *Mathews,* 403 F.2d 181, 188 (1968), that court held:

> "If in a school district there are still all-Negro schools, or only a small fraction of Negroes enrolled in white schools, or no substantial integration of faculties and school activities then, as a matter of law, the existing plan fails to meet constitutional standards as established in *Green.*"

In *Henry* v. *Clarksdale Municipal Separate School District,* 409 F.2d 682 (1969), the Fifth Circuit rejected a geographic zoning or "neighborhood" attendance plan for Clarksdale, Miss., because it failed to achieve sufficient pupil integration. The court said:

> "A school board's zoning policy may appear to be neutral but in fact tend to retard desegregation because it binds pupils to custom-segregated neighborhoods. In this situation, the board's failure to take corrective action amounts to the State's giving official sanction to continue school

time maintaining the neighborhood school concept of the school system." In other words, it erected the maintenance of "neighborhood schools" into an absolute which overrides the constitutional obligation to disestablish the dual school system.

We submit that the "neighborhood school concept" has no such constitutional status. It is rather one among several concepts used in this country as a basis for assigning students to schools. Whether or not it should be adopted by a particular school district is a matter of educational policy, to be decided by school officials within the constraint of the constitutional requirement of complete disestablishment of the dual school system. That is the proper order of priorities—not, as the court below would have it, that courts are to meet constitutional requirements within the constraint of a particular educational theory of pupil assignment.

One need look no further than Mobile, Alabama, to see that the "neighborhood" system of pupil assignment is not uniformly in use throughout this country. Mobile has never had a neighborhood school system. Until very recently, it has had a racial system of assignment, under which black and white children both rode on buses past nearby schools designated for the other race on the way to their own "black" or "white" school. More recently, under pressure from the courts

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segregation . . . ." 409 F.2d at 689. And see *United States* v. *Indianola Municipal Separate School District*, 410 F.2d 626 (1969).

Only recently, the Fifth Circuit's second decision in the *Clarksdale* case reiterated the holding that geographic zoning which left all-black schools did not meet constitutional standards. *Henry* v. *Clarksdale Municipal Separate School District*, No. 29165, August 12, 1970 (slip opinion at 3).

to desegregate, Mobile school officials have adopted a crazy-quilt of assignment policies, detailed in the Appendix to the Brief for Petitioner in No. 436, all designed to achieve maximum segregation rather than contiguity of child's home to child's school.

Alternatives to neighborhood school assignment have been adopted for many reasons other than to avoid desegregation. The largest part of the history of rural schools in America during this century has been the movement from the one-room "neighborhood" school to which each child could walk, to the larger consolidated school which requires a system of bus transportation—a movement promoted by the search for better education through the economies of scale possible in larger schools. Similarly in many of our larger cities, the "neighborhood concept" is violated every day as thousands of children with special abilities or special problems attend far-away schools with specialized programs designed to meet their needs.

This is not to say there are no values in having schools close to home. There are of course the values of convenience and of minimizing time and money spent in transportation. There are the values of linking the school to a community, and of giving parents ready geographical access to their children's school, though these are often exaggerated in present day conditions.[19] (In urban areas today, few "neighborhood"

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[19] To the extent that there are values in having children attend school close to home, one of the issues in both the *Charlotte* and the *Mobile* cases is whether black children have a right to share in these values equally with white children. Acceptance of a half-way approach to pupil integration has usually meant that black children are "integrated" into white schools in white neighborhoods, while there is no corresponding transportation of white children to black schools in black neighborhoods. See Note 7, *supra*, and accompanying text.

schools really serve anything remotely like a real community; and once the school is removed beyond walking distance from the home, as it often is even in our cities, the distance a parent must drive or take public transportation to reach his child's school becomes only a matter of degree.)

The rule which the Fifth Circuit has built upon the concept of the neighborhood school does not even have the exactness and precision which appears at first glance to be its chief virtue. Once this Fifth Circuit panel departs from the strict mathematical model of the "neighborhood school" which it constructed in *Ellis* v. *Board of Public Instruction of Orange County*, 423 F.2d 203 (1970)—and as far as we know, that model has been applied *only* in that single case—it becomes most unclear exactly what the "neighborhood school concept" is. It does not bar the pairing of schools, for instance; the court of appeals ordered schools paired in this very case, observing only that the pairings were "well within any reasonable definition of a neighborhood school system."

Ultimately, the "neighborhood school" rule must be rejected because it excuses the continuation of black schools in districts with dual systems for reasons short of the complete unfeasibility of total desegregation, reasons which are too easily and too often used to mask opposition to desegregation itself. This Court has in the past dealt unequivocally with apparently neutral slogans which effectively produce continued segregation—with "political impossibility," *Cooper* v. *Aaron*, 358 U.S. 1 (1968), with "freedom of choice," *Green*, supra, with "administrative chaos," *Alexander*, supra. "Neighborhood schools" is, in the context of this case, merely another of these slogans behind which continued

segregation can take shelter, and should be dealt with the same way.[20]

B. The Charlotte Case and the "Rule of Reasonableness".

The rule laid down by the Fourth Circuit in the *Charlotte* case—that school boards operating dual systems must make "all reasonable efforts to integrate every school" (1277a)—has the single advantage over the Fifth Circuit's "neighborhood school" rule that it does not bar the use of the legitimate and accepted technique of noncontiguous or satellite zoning as a tool for eliminating the effects of official segregation. In every other respect, however, the Fourth Circuit's "reasonableness" doctrine as applied in this case is a wholly unacceptable standard by which to measure compliance with the constitutional mandate.

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[20] In this case, the court of appeals held that the wrong inherent in the maintenance of black schools "can be further alleviated through a majority to minority transfer policy and through the functioning of a bi-racial committee." Similarly in the *Charlotte* case, the Fourth Circuit noted factors which would ameliorate the existence of black schools: majority to minority transfers, integrated special classes and out of school activities, and the requirement that each student must at some point in his career attend an integrated school.

These devices, taken by themselves, are all half-way measures, so long as black children continue to attend black schools in the face of feasible alternatives. In particular, the majority to minority transfer device puts upon black children the burden of desegregating the schools, whereas the *Green* case firmly declares accomplishment of that task to be the affirmative duty of the school board. And the notion that an integrated education for part of a child's career excuses assigning him to an all-black school for the remainder is reminiscent of the "grade a year" and other gradualist approaches to desegregation common during the era of "all deliberate speed."

First, the "reasonableness" test is scarcely a standard at all, in the sense of a meaningful guide for the school officials and district courts who must administer the process of desegregation. The test allows as an excuse for failing to achieve the goal of complete integration the "unreasonableness" of the steps needed to accomplish the task. "Unreasonableness", as the Fourth Circuit sees it, is a conclusory term through which judges can express a subjective judgment that the difficulties of achieving complete desegregation are simply too much for school officials to have to put up with. Promulgation of a "standard" like this is a guarantee of years of continued litigation and strife, with inconsistency even in the end as the promised result.[21]

Second, the "reasonableness" test impermissibly tolerates the perpetuation of remnants of the system of segregation which could feasibly be eradicated. This case makes clear that for the Fourth Circuit, "unreasonable" does not mean unfeasible or unworkable in practice. It has never been seriously argued that the plan ordered by Judge McMillan could not be put into effect consistently with the continued effective operation of the Charlotte-Mecklenburg school system—indeed, that system is today operating under that plan.

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[21] As Judge Sobeloff has said, dissenting below:

> "Handed a new litigable issue—the so-called reasonableness of a proposed plan—school boards can be expected to exploit it to the hilt. The concept is highly susceptible to delaying tactics in the courts. Everyone can advance a different opinion of what is reasonable. Thus, rarely would it be possible to make expeditious disposition of a school board's claim that its segregated system is not 'reasonably' eradicable." (1290a).

There is no plausible argument that harm or injury to the children invalidates the district court plan, for the record contains no evidence of such harm. Under the district court's plan a lower proportion of children will be bused to school in Charlotte than are bused in the state as a whole. The average length of the bus trip for those newly bused under the district court plan is less than the average length both for the state as a whole, and for the children previously bused within the Charlotte-Mecklenburg system.

The court of appeals' objections to the district court plan seem to be based on its monetary cost alone. That objection is insufficient on its face. The operating cost of the elementary school busing ordered by the district court was found by the court to be about $186,000, this in a school system with a projected operating budget of about $66 million. The capital cost of the new buses is not precisely known, but all of the evidence indicates that it will surely be far below the original estimate of $745,000 for the district court's entire busing plan. As the district court found in its hearings after this Court granted certiorari, surplus buses owned by the Charlotte-Mecklenburg system, and extra buses available through loan from the state, have brought about a situation where "[n]o capital outlay will be needed to supply buses for the 1970-71 school year." Appendix to Brief for Petitioner, Br. A23.

As a general matter, the fact that it costs money to desegregate the schools is no excuse for failure to do the job. *Griffin* v. *County School Board of Prince Edward County,* 377 U.S. 218 (1964). Whatever may be the outer limits of that principle—whether, in some hypothetical case, the monetary cost of desegregating

each school in a system might be so great as to disable the operation of that system and hence render achievement of the goal "unfeasible"—those outer limits are not even approached in this case.

In this case, Judge McMillan has shown that the process of desegregation can be completed, and a wholly unitary system can be achieved in an urban southern school district with substantial residential segregation. He has in fact done the job which this Court entrusted to the federal district judges of the South in *Brown II*, and he has done it with patience, sensitivity and skill. That good work should not be undone by the court of appeals' vague and constitutionally insufficient "rule of reasonableness." [22]

C. The Question of Busing.

In the popular press and in the political arena, these cases are generally thought to be primarily concerned with the question whether the busing of children to school is required as part of the process of desegregation. As we see the cases, this is at most a peripheral issue. The process of disestablishing dual school systems requires a *result*—the abolition of the black

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[22] Judge McMillan made extensive findings to the effect that residential segregation in Charlotte was in large part the result of state action (297a-298a, 455a-456a, 1229a). These findings were summarized and affirmed by the court of appeals (1264a). While these findings compound the constitutional wrong of using geographic zoning to impose segregated housing patterns on the schools, we do not rely upon them here. Our view is rather that school officials are required to take all feasible steps, including transportation of pupils, to eliminate racially identifiable schools, whatever the cause of residential segregation may be. Cf. *Brewer v. School Board of the City of Norfolk*, 397 F.2d 37, 41-42 (C.A. 4, 1968).

schools which were part of that system. The means to be used to accomplish this end are limited solely by technical feasibility. Busing of children to schools is merely one among many tools which can be used to bring about the required result.

As the Fourth Circuit itself noted in the *Charlotte* case, "[b]ussing is neither new nor unusual. It has been used for years to transport pupils to consolidated schools in both racially dual and unitary school systems. Figures compiled by the National Education Association show that nationally the number of pupils bussed increased from 12 million in the 1958-59 school year to 17 million a decade later." Today about 40 percent of the nation's school children ride a bus to school. As the Center for Urban Education has put it, "Riding the yellow school bus is as much a symbol of American education in 1970 as the little red schoolhouse was in 1900." Center for Urban Education, "On the Matter of Busing" at 1 (Staff Memorandum, February 1970).

Busing has in the past been used for numerous purposes, some worthy, though none perhaps so important as helping to overcome decades of unconstitutional discrimination. It has been used to get rural children to the larger and more efficient consolidated schools which replaced their one-room schoolhouse. In the suburbs, it has been used to transport children over large areas to the excellent schools which those communities often provide. In cities, it has been used to overcome the safety and health hazards of children walking to school through city streets or taking public transportation. In each of these instances busing has cost money and has coincided with children attending school far from their homes, but not until it was used to achieve desegregation did it become an issue of public controversy.

The school officials and parents who so vigorously object to busing for purposes of desegregation raised no similar outcry in past years against the extensive busing required to maintain the system of racially segregated schools. Today, white parents who remove their children from public schools to avoid integration typically put the same children on buses for long rides to segregated private schools, and pay heavily for the privilege. A recent survey conducted by the Southern Regional Council indicated that a random sample of recently established white private schools bused an average of 62 percent of their pupils (as opposed to 49 percent of public school pupils in eight southern states) an average distance of 17.7 miles (as opposed to 10.1 miles for public school pupils in these states) each day to school. Levine and Griffith, *The Busing Myth*, South Today, Vol. 1, No. 10, at 7 (May 1970).

There is no evidence that busing is in any way harmful to children. As the district court found in the *Charlotte* case, "[s]chool bus transportation is safer than any other form of transportation for school children." Appendix to Brief for Petitioners, No. 281, at Br. A16. The only study we have found of the psychological effects of busing for purposes of desegregation, made by a distinguished child psychiatrist, found that children being bused in the Boston public school system experienced "no significant medical or psychiatric 'harm' or 'injury' as a result of the travel or change." Coles, *Northern Children Under Desegregation*, 31 Psychiatry 1, 14 (1968).

In short, busing of children to school is simply a technique which can be used for good or for ill in the administration of a school system. The facts about

busing, its extent and its past acceptance, suggest that the recent outcry against it is merely the 1970 version of the sixteen year old campaign to undermine the *Brown* decision.

CONCLUSION

The importance of these cases to the vindication of the constitutional rights of black children—rights which have been long denied—cannot be overestimated. If the decisions of the courts of appeals below are allowed to stand, the answer to the question "What has Brown accomplished?" will be forever an equivocal one. Much of the formal structure and some of the concrete manifestations of the system of segregation will be gone. But thousands of black children will spend years of their educational careers—most often the earliest, formative, years—in schools indistinguishable as a practical matter from the black schools established by the system of segregation. After all the years of turmoil and tragedy around the lives of these black children, it simply cannot be that they will be forced to settle for formal or half-way equality. The system of segregation and its effects must be abolished—all of it.

Accordingly, we ask that the judgments of the courts of appeals be reversed, and the cases remanded for

further proceedings consistent with principles urged in this brief.

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Of Counsel

No. 281

amicus curiae brief of Tenn. Federation for Constitutional Govn. et al filed on Oct. 7, 1970 (not printed)

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Amicus curiae brief of H. W. Cullen, et al., filed on Oct. 6, 1970. (not printed)

Brief, amicus curiae, Board of Education of Memphis City Schools filed on Oct 10, 1970 (not printed)

Motion and Brief of Congress of Racial Equality for leave to file brief, as amicus curiae filed. (Motion filed Oct. 13, 1970) (Brief filed Oct 19, 1970) (not printed)